231883

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35583

EASTERN ALABAMA RAILWAY LLC – PETITION FOR DECLARATORY ORDER

MOTION TO STRIKE

Matthew F. Carroll
Balch & Bingham LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 226-3451

Sandra L. Brown
David E. Benz
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, DC 20036
202.263.4101
202.331.8330 (fax)

Attorneys for The Utilities Board of the City of Sylacauga

February 22, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35583

EASTERN ALABAMA RAILWAY LLC –
PETITION FOR DECLARATORY ORDER

MOTION TO STRIKE

The Utilities Board of the City of Sylacauga ("Utilities Board"), pursuant to 49 CFR § 1117.1, hereby moves to strike certain portions of the Rebuttal Evidence ("Rebuttal") filed by petitioner Eastern Alabama Railway LLC ("EARY") on February 21, 2012. As described below, EARY improperly submitted new evidence in its Rebuttal, proffered irrelevant and immaterial information, and asserted the incorrect legal standard applicable to this proceeding. The Surface Transportation Board ("STB") should strike this material from the record.

I. The STB should strike certain evidence as improper rebuttal, irrelevant, and/or immaterial.

With its Rebuttal, EARY has unleashed an inflammatory and somewhat incoherent smorgasbord of unrelated facts, questions, claims, and accusations about nearly everything but preemption. For example, EARY has yet to state whether it believes the Alabama condemnation case is categorically preempted or preempted as applied. EARY has not shown that the Alabama courts are incapable of making a determination that the two pipelines at issue in the condemnation case, one pre-existing, have and/or will unreasonably interfere with rail operations. Ala. Code § 18-1A-72(b). Indeed, EARY has apparently conceded that there is no

preemption with respect to the pre-existing pipeline, because the Rebuttal focuses on only a single pipeline – the proposed new sewer line. See, e.g., Rebuttal at 9 (stating that "the instant proceeding is about the construction of a sewer pipeline").

The Utilities Board does agree that its relationship with EARY has become contentious at times in the past few years. However, the Utilities Board has notified EARY at the earliest time possible before any need to access the right-of-way.[1] More broadly, the fact that the parties have a contentious relationship is not pertinent to the preemption issue. EARY has provided no evidence that the continued adjudication of the Alabama condemnation case will unreasonably interfere with its rail operations.[2] Instead of concentrating on whether the condemnation case is preempted, EARY continues to toss red herrings into the mix, such as the erroneous claim that the Utilities Board seeks "unfettered access" to the EARY right-of-way. See, e.g., Rebuttal at 3 and 19. The Utilities Board's Complaint for Condemnation is limited to the uses sought by the Utilities Board and is not "unfettered." See, e.g., Reply Evidence at 15-16.

The purpose of rebuttal is to respond to the opponent's reply evidence, not to submit new evidence that should have been submitted as part of opening. As the petitioning party, EARY was given the opportunity to file two rounds of evidence: Opening and Rebuttal, but the Rebuttal should have been confined to responding to the Utilities Board's Reply Evidence. Cf. 49 CFR § 1112.6 ("Rebuttal statements shall be confined to issues raised in the reply statements to which

[1] The Utilities Board already addressed the scenario, for example, were there was an emergency downed line that the Utilities Board did not know was across the EARY track until the workers found the line. See Reply at 19.

[2] Rather there is sworn deposition testimony from EARY that establishes the 2010 construction process and the operating of existing pipelines do not unreasonably interfere with rail operations. See, Reply to Petition at 14-17 and Reply at 4, 18, 21).

they are directed."). EARY has not stayed within this permissible boundary.[3] The new evidence "is an attempt to bolster [EARY's] case-in-chief and contains material that should have been submitted at that time"; consequently, it should be stricken. Union Pacific Corporation et al. – Control – Chicago & North Western Transportation Company, ICC Docket No. 32133, Decision No. 20, slip op. at 3-4 (served Sept. 12, 1994). Cf. Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070, slip op. at 4 (served March 25, 2003); General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 STB 441, 446 (2001). The Utilities Board has been prevented from replying to all the items listed below – all of which are impermissible new evidence on rebuttal. The new evidence should be stricken.

Moreover, every item listed below should also be stricken as immaterial and irrelevant. 49 CFR § 1104.8.[4] EARY has significantly deviated from the preemption issue at the heart of this proceeding and, therefore, the immaterial and irrelevant material should be stricken. Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc., STB Docket No. WCC-101, slip op. at 2 (served Sept. 15, 2005) (material stricken where party strayed from the intended purpose of the pleadings).

---

[3] Accepting EARY's full Rebuttal would also allow EARY to unilaterally circumvent the STB's decision released today denying EARY's request to modify the procedural schedule.

[4] EARY also makes numerous assertions that are simply inaccurate. Indeed, the Utilities Board notes that EARY's own exhibits do not support many of the assertions it makes in its pleadings, such as its suggestion that it was willing to grant the Utilities Board a license without requiring condemnation and that it acted promptly when the Utilities Board submitted revised plans. Instead, the email it attaches as an exhibit to its pleading confirms that EARY received revised plans from the Utilities Board in November and simply sat on them, at least until last week when it became tactically expedient for purposes of its claim in this proceeding to respond. EARY's claim that it "can process an approved application in less than 48 hours" is in direct conflict to its own evidence that it took over two and a half months for EARY to respond to the Utilities Board's revised application. See Rebuttal at 6.

Indeed, most of the material below does not even address the Hill Road site that is the subject of the condemnation case.

The improper new evidence is as follows:

1. The alleged annual fee of the license "for the new pipeline." See, e.g., Rebuttal at 6 and 18; Greenwood V.S. at 4. Not only is the alleged fee improper new evidence that could have been submitted in Opening, but the alleged fee does not appear to include the second pipeline that is the subject of the condemnation action.[5]
2. The assertions regarding Strong Capital, including the assertion that EARY cannot enter into agreements regarding crossings of its rail line where those crossings have been assigned to Strong Capital. See, e.g., Rebuttal at 6-8; Exhibit N.
3. EARY's various assertions and characterizations concerning the settlement agreement the parties reached in September, and EARY's claims that the Utilities Board tried to inject terms beyond what was expressly agreed. See, e.g., Rebuttal at 6-8
4. The desire of EARY to have "Class I" style construction standards. See, e.g., Rebuttal at 12; Romaine V.S. at 12.
5. The assertion that EARY has an "easy web-based process for notification." See, e.g., Rebuttal at 11 (n. 16).
6. Construction specifications of Norfolk Southern, CSXT, BNSF, and North Carolina Railroad Company. See, e.g., Romaine V.S. at attachments.

[5] While the fee asserted by EARY may appear small, the true fees desired by EARY would put a significant dent in the Utilities Board's limited budget. For all of the Utilities Board's crossings, EARY wanted an annual payment of over six figures and, then, later said that such payment, reluctantly agreed to by the Utilities Board, actually did not include dozens of existing crossings. Moreover, EARY makes clear that this is an annual and recurring fee subject to a two and one half percent escalation. See Greenwood V.S. at 4.

7. An alleged event involving Buford Tree Service, a purported "known contractor for the Utilities Board." See, e.g., Rebuttal at 12-13.

8. References to hazardous materials. See, e.g., Rebuttal at 16; Devin V.S. at 2.

9. The list of ten alleged uses of the rail line. See, e.g., Nordquist V.S. at 1.

10. Further descriptions of numerous alleged events that were previously described in the Opening Evidence. See, e.g., Nordquist V.S. at 2-4; Benefield V.S. (entire statement). This material should have been submitted on opening.

11. The assertion that the Utilities Board's safety standards "are lower than those of the EARY's [sic]." Nordquist V.S. at 4.

12. Descriptions of hypothetical events that can allegedly occur due to pipelines. See, e.g., Devin V.S. at 1-3.

13. Descriptions of EARY's alleged insurance needs. See, e.g., Devin V.S. at 2-3.

14. A photograph alleged to be of the Florida East Coast Railway. See Devin V.S. attachment.

15. A photograph of a depression allegedly caused by a broken culvert in an unknown location on an unknown railroad. See Devin V.S. attachment.

16. The desire to enforce pipeline maintenance. See, e.g., Devin V.S. at 2.

17. The assertion that EARY would approve a third application for a crossing, if filed by the Utilities Board. See, e.g., Greenwood V.S. at 2; Romaine V.S. at 1-2.

18. Further descriptions of alleged problems with two prior pipelines constructed by the Utilities Board in 2010, even though such pipelines were already described in the Opening Evidence. See, e.g., Greenwood V.S. at 3.

II. The STB should strike the improperly described burden of proof.

Despite the fact that it is the petitioner, EARY asserts that the burden of proof should be on the Utilities Board. Rebuttal at 8. Not only is this assertion legally incorrect, but it also ignores the entire structure of this case – where EARY has been given two rounds of evidence compared to the single round afforded the Utilities Board.

The assertion made by EARY is directly contrary to recent decisions of the STB. In the first coal dust proceeding, the STB noted that "[a]s the party petitioning the agency for a declaratory order, AECC...bears the burden of proof in this proceeding. See 5 U.S.C. § 556(d)." Arkansas Electric Cooperative Corporation – Petition for Declaratory Order, STB Docket No. 35305, slip op. at 4 (served March 3, 2011) (emphasis in original). See also Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 35504, slip op. at 4 (served Dec. 12, 2011) ("UP will bear the burden of proof because it is the party seeking the declaratory order.").

Given the existence of thousands of underground pipeline crossings of rail right-of-way in the U.S., not to mention the established legal precedent on the issue of routine underground pipelines beneath rail lines[6], the necessity for EARY to have the burden of proof is all the more apparent. EARY's incorrect statement of the burden of proof should be stricken as irrelevant and immaterial. 49 CFR § 1104.8.

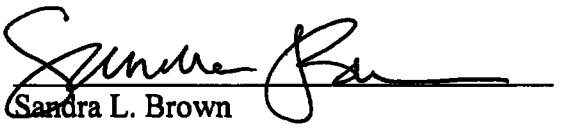
III. Conclusion.

The Utilities Board respectfully requests that the STB strike from the record all of the material from EARY's Rebuttal as described herein.

---

[6] See page 9 of the Reply to Petition, filed by the Utilities Board on January 19, 2012.

Respectfully submitted,



Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 263-4101
sandy.brown@thompsonhine.com

Matthew F. Carroll
Balch & Bingham LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 226-3451
mcarroll@balch.com

February 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of February 2012, I served a copy of the foregoing upon counsel for defendant EARY as described below:

Via U.S. first class mail, postage prepaid, and electronic mail:

Louis E. Gitomer, Esq.
The Law Offices of Louis E. Gitomer
Suite 301
600 Baltimore Avenue
Towson, MD 21204

Lou@lgraillaw.com

Counsel for Eastern Alabama Railway LLC

Via U.S. first class mail, postage prepaid:

Scott G. Williams, Esq.
Senior Vice-President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256

and upon other parties of record by electronic mail.

David E. Benz